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No. 95-530

In The

# Supreme Court of the United States

October Term, 1995

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

*Petitioner*,

vs.

KARL W. GREEN,

*Respondent*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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## REPLY TO NEW POINTS RAISED BY RESPONDENT

This reply brief addresses the points raised by Karl W. Green in his brief in opposition to The Denver & Rio Grande Western Railroad Company's ("D&RGW") Petition for a Writ of Certiorari. This Court's consideration of the issues that would be considered on an appeal to this Court are important not only to D&RGW and all other railroads and railroad employees in this country, but many other litigants in federal and state courts where the applicability of the collateral source rule is at issue as well as litigants before federal appellate courts where the issue is the prejudicial effect of evidence admitted at trial. This reply brief is necessary to clarify misrepresentations and even misstatements contained in Mr. Green's brief.

## I.

## CERTIORARI SHOULD BE GRANTED TO OVERRULE *DICTA* IN *EICHEL* THAT NEITHER THIS COURT NOR ANY CIRCUIT COURT HAS FULLY ANALYZED AND CONSIDERED.

Mr. Green argues that *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) should not be overruled. However, rather than stating any reason why *Eichel* should remain good law, Mr. Green argues that the D&RGW has failed to present any compelling argument why it should not. Mr. Green's argument underscores the most compelling reason why certiorari is necessary in this case.

D&RGW seeks certiorari so that this Court can fully consider, for the first time pursuant to the adversarial process, an issue that was discussed by the *Eichel* Court only in *dicta*

but never was fully briefed nor argued because it was conceded by the parties in that case. D&RGW seeks to have this Court consider and decide whether Railroad Retirement Act, 45 U.S.C. § 231 *et seq.* ("RRA"), disability benefits, paid to an injured railroad employee, are not from a collateral source so that the amount of these benefits can be used to offset damages in that employee's action against his employer under the *Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.* ("FELA").

Mr. Green's argument assumes that the *Eichel* Court considered this issue and made its statement in *dicta*[1] against such an offset for valid reasons. It did not. Moreover, the circuit courts also have disallowed any offset solely because of the *dicta* in *Eichel*, and not because of any independent analysis or valid reason supporting such a conclusion. As did the Tenth Circuit below, these courts have believed they were so compelled to follow the *dicta* of the *Eichel* Court that none of them have considered the underlying reasons for and against the statement made in *Eichel*. The refusal of any appellate court to fully and carefully consider this issue is compelling reason,

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[1] The Tenth Circuit did in fact, as Mr. Green suggests, say that this *dicta* in *Eichel* "was necessary to the holding that *admission of* evidence of those [RRA disability] payments to prove malingering was *not harmless*." (App., D&RGW's Petition, p. 9a, emphasis added.) However, both the Tenth Circuit and Mr. Green err in that the *Eichel* Court did not hold that admission of any evidence was not harmless. Since, in *Eichel*, the evidence of the RRA disability benefits never was admitted, the *Eichel* Court merely held that the *exclusion* of such evidence was *not harmful*, and specifically upheld the trial court's ruling because the probative value of such benefits to prove malingering was outweighed by the potential for prejudice when other evidence of malingering was available that would be more probative. *Eichel* at 255. (App., D&RGW's Petition, p. 24a.) Hence, clearly the *dicta* of the *Eichel* Court regarding the defendant's concessions that it could not have an offset for such benefits paid to the plaintiff is in fact pure *dicta* that is superfluous to the actual holding of the *Eichel* Court.

in and of itself, for this Court to grant certiorari in order to consider this important question of federal law.

Moreover, there are compelling reasons why this Court, after fully and carefully considering this issue, should correct the *dicta* it previously made in *Eichel*. RRA disability benefits are funded by substantial employer contributions.[2] Such a fact is critical in determining that such benefits are not from a collateral source. *Mays v. United States*, 806 F.2d 976, 977 (10th Cir. 1986); BLACK'S LAW DICTIONARY 262 (6th ed. 1990). In addition, as discussed in D&RGW's Petition, there are compelling public policy reasons for allowing such an offset which Mr. Green did not even address and which will not be restated here.[3] Significantly, Mr.Green did not provide any reason to conclude that a denial of such an offset is necessary

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[2] Federal law requires D&RGW to pay into the RRA disability fund. A complete discussion of the significant amounts paid into this fund by all railroad companies is set forth in the Brief of Association of American Railroads as Amicus Curiae in Support of Petition which has been filed in this matter.

Mr. Green seems to imply that this Court reached the contrary conclusion, that RRA disability benefits are not from contributions of employer railroad companies, because of the *Eichel* Court's reference to *New York, New Haven & Hartford Railroad v. Leary*, 204 F.2d 461, 468 (1st Cir. 1953). The *Leary* case is discussed by D&RGW in its initial Petition at pages 9-10, and it clearly does not hold that railroads do not contribute to the RRA disability fund nor could it invalidate this fact; a fact which never has been denied by Mr. Green.

[3] In summary, the continuing validity of the collateral source rule, especially in factual situations presented by the facts of the instant case, is under critical attack. This argument was made before the Tenth Circuit and is properly brought here since the collateral source rule is a judicial rule of public policy that should not be allowed to continue without valid reasons. (See authorities cited in D&RGW's Petition pages 14-15 and notes 6 and 7.) Hence, in

to achieve any valid objective. The denial of the offset merely provides a windfall to railroad employees while their employers end up paying twice.

Clearly these facts present compelling reasons for granting certiorari in order for this Court to fully consider the important federal question of whether offsets should be allowed for employer funded RRA disability benefits in FELA cases.

## II.

## CERTIORARI SHOULD NOT BE DENIED MERELY BECAUSE CIRCUIT COURTS HAVE CONSISTENTLY FOLLOWED THE *DICTA* IN *EICHEL*, AND CERTIORARI SHOULD BE GRANTED BECAUSE OF THE INCONSISTENCY IN SIMILAR HOLDINGS OF THE TENTH CIRCUIT.

Conflict in circuit court decisions certainly has been expressed by this Court to "indicate the character of the reasons the Court considers" when reviewing a petition for writ of certiorari. SUP. CT. R. 10. Never, however, has this Court stated that certiorari would be denied simply because circuit court decisions were consistent. Such a rule would ignore situations, such as now before this Court, where the circuit court decisions are not based upon analysis or reasoning derived from the adversarial process.

The very fact that circuit courts, as did the Tenth Circuit in the instant action, consider themselves compelled to adhere

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addition to considering the federal question of whether RRA disability benefits are from a collateral source in an FELA action, this Court should consider the continued viability or scope of the collateral source rule.

to mere *dicta* without any independent analysis is reason why this Court should grant certiorari. A review of the cases cited by Mr. Green, and D&RGW, reveal that it is necessary for this Court to be fully briefed and carefully consider the important federal question of whether RRA disability benefits funded by railroad defendants should be offset against damage claims. This Court should grant certiorari to decide this issue directly through the adversarial process since because of the *dicta* in *Eichel* no other appellate court will.

In addition, Mr. Green's argument overlooks the inconsistency in the Tenth Circuit's own decisions. In *EEOC v. Wyoming Retirement System*, 771 F.2d 1425 (10th Cir. 1985), for example, the Tenth Circuit allowed an offset to damages by the amount of social security retirement benefits the claimants received, where both the claimants and defendant contributed to that fund, noting that the claimants would not have received those benefits had they not been wronged by the defendant.[4] Railroad employees do not receive social security; they receive similar benefits under the RRA. Mr. Green, in the instant action, received RRA benefits, where both he and the D&RGW contributed to the fund from which the benefits were paid, and he clearly would not have received those benefits had he not been disabled. However, the Tenth Circuit denied D&RGW the same offset it gave to Wyoming Retirement System.

The only reason the Tenth Circuit has discriminated against D&RGW is because it believed it was compelled to

[4] This case is not distinguished simply because it did not involve a jury trial. Mr. Green did not have to involve the jury in making the required offset in the case at bar. He chose to do so against the admonition of the trial court. If there is a distinction, it was caused by Mr. Green refusing to follow the advice of the trial court, and it should not operate to the detriment of D&RGW.

follow the *dicta* in *Eichel*. Moreover, just because all railroads will be treated alike, as Mr. Green argues, is not a reason to support their being treated worse than other employers.[5] There is no reason to treat railroad employers differently than other employers when it comes to protecting them from having to pay twice for an employee's damages. Certiorari should be granted to correct the inconsistency in the Tenth Circuit's decisions, and the discriminatory effect it has on D&RGW in this case.

## III.

## THE TENTH CIRCUIT'S DECISIONS WERE NOT INCONSISTENT UNTIL ITS DECISION IN THE INSTANT ACTION.

Mr. Green complains that D&RGW did not previously argue that the Tenth Circuit's decision is discriminatory. Obviously, D&RGW could not make this argument until the Tenth Circuit discriminated against D&RGW with a decision that is inconsistent with its previous holdings for non-railroad employers. There was no inconsistency, and no discrimination, until the Tenth Circuit rendered its opinion in this case. In fact, the trial court expressly relied upon the Tenth Circuit's prior decisions in determining that it was within its discretion to allow the offset. (App., D&RGW's Petition, pp. 19a-20a.) The trial court assumed the Tenth Circuit would treat railroad employers in a manner consistent with the way it had treated the non-railroad employer in the *EEOC* case. *Id.*

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[5] Mr. Green's argument leads to the analogous, and obviously improper, conclusion that discrimination against, for example, women or blacks is acceptable because at least all women and blacks will be discriminated against equally.

Neither, *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 113 S.Ct. 1937, 1942 n.9 (1994) nor *Davis v. United States*, 417 U.S. 333, 340 (1974), cited but not explained by Mr. Green, restrict D&RGW from pointing out the discriminatory effect of the Tenth Circuit's opinion below as a reason for this Court to grant certiorari in order to review that opinion. *Cf. United States v. Cretacci*, 62 F.3d 307, 310 (9th Cir. 1995).

## IV.

## THE ISSUE OF WHETHER RAILROAD DISABILITY BENEFITS SHOULD BE ALLOWED TO OFFSET CLAIMS OF LOST WAGES IS RIPE FOR REVIEW BY THIS COURT.

Mr. Green makes the off handed comment in point 2 of his brief that the issue of whether RRA disability benefits may offset damages is not presented by this case. This statement simply is untrue. This issue was the subject of Mr. Green's motion in limine before the trial court and it was the principal point argued before the Tenth Circuit.

Mr. Green filed a motion in limine to exclude any evidence that would be offered to obtain an offset for the RRA disability benefits he was receiving. The trial court, after independent research and arguments from both sides, denied the motion and held that such an offset should be allowed in order to avoid the injustice of D&RGW paying twice for Mr. Green's claim of lost wages and lost future earnings. The trial court held that the offset did not violate the collateral source rule, and allowed D&RGW to present evidence of such benefits if Mr. Green did not provide for the offset in his damages

evidence. Mr. Green appealed this ruling. D&RGW discussed this issue at length in Points II, III, and IV of its brief filed with the Tenth Circuit.

In light of the Tenth Circuit's reversal of the trial court's ruling and its holding that the submission of such evidence created prejudicial error for Mr. Green, it is beyond dispute that the issue of whether RRA disability benefits may offset damages is properly subject to review by this Court should it grant certiorari.

## V.

## CERTIORARI ALSO SHOULD BE GRANTED BECAUSE THE TENTH CIRCUIT'S METHOD FOR FINDING REVERSIBLE ERROR IS INCONSISTENT WITH OTHER DECISIONS OF THE TENTH CIRCUIT, OTHER CIRCUITS AND THIS COURT.

Mr. Green focused only on the actual *holdings* of the Tenth Circuit and other circuits in their prior decisions, and of this Court in *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963), and not on the unique facts and analyses that supported those holdings. The holdings may be the same, but the analyses the Tenth Circuit used in this case to reach the same conclusion is not. Consequently, Mr. Green has not, nor can he, refute the point that other courts, including this Court in *Tipton*, have analyzed the facts from which they found there to be error and concluded that a substantial right of the complaining party was prejudicially affected. The Tenth Circuit's decision in this action, holding that "reversible" error exists as a matter of law just because of the error, is inconsistent with the law and reason, and should not be allowed to stand.

Moreover, any such per se rule of reversible error would create injustice. Prejudice, or lack thereof, should be determined on the basis of the facts and should not be presumed. In the instant case, the facts that Mr. Green himself introduced the error,[6] that it was not emphasized nor discussed by D&RGW, and that Mr. Green's introduction of the error was innocuous are important and should be considered in determining whether there was prejudice to Mr. Green. In addition, error itself also should be determined from an examination of the facts to evaluate whether there are other reasons for supporting the evidence so that its admission would not be in error. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *United States v. Flower*, 29 F.3d 530, 536 n.9 (10th Cir. 1994). For example, in the case at bar, D&RGW argued below that evidence of Mr. Green's receipt of RRA disability benefits was not error but was necessary to clarify Mr. Green's evidence of loss of future RRA retirement benefits. *Moore v. Missouri Pac. R.R.*,825 S.W.2d 839, 842-43 (Mo. 1992). The Tenth Circuit ignored all of these facts and failed to even consider whether in fact there was error, even if the trial court was wrong regarding the offset, and then whether any such error was prejudicial to Mr. Green.

Mr. Green has not refuted D&RGW's point that the Tenth Circuit failed to analyze the specific facts of this case in determining that there was reversible error. The Tenth Circuit's failure to do so is in direct conflict with how this Court determined there to be error that was harmful in *Tipton*. The

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[6] Mr. Green seems to take comfort in the fact that before he introduced evidence of his receipt of RRA disability benefits he preserved his objection to the trial court's ruling. However, the fact that he preserved his objection does not relieve him of the effects of his conduct in introducing that evidence when the trial court counselled him not to and provided to him an option that would have prevented the jury from ever hearing such evidence.

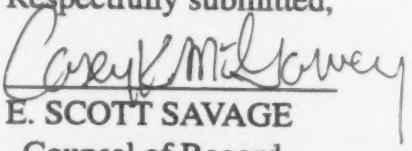
rendering of an opinion that is inconsistent with an opinion of this Court certainly is a compelling reason to grant certiorari. The necessity of granting certiorari is even more compelling because the issue of when an appellate court may find reversible error has widespread applicability to all types of cases where error from the admission of evidence is claimed on appeal.

## CONCLUSION

Compelling reasons exist for this Court to grant certiorari in order to review the important federal questions and questions of public policy and appellate review that arise from the Tenth Circuit's opinion below. Determination of the issues presented by this appeal to this Court would greatly clarify presently unreasoned areas of federal law and public policy, as well as promote consistency in the Tenth Circuit and among the circuit courts. D&RGW's petition for a writ of certiorari should be granted.

DATED this 9th day of November, 1995.

Respectfully submitted,



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